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Supreme Court of the United States

OCTOBER TERM, 1964

No. 795

LUCIAN J. ROSSI,

Plaintiff-Petitioner,

against

WILLIAM MARX, CHARLES PUNIA, PHILIP LIPSTEIN, HELEN GORDON, General Partners, and HELEN S. MARX, LEONARD P. PUNIA, HERBERT PUNIA, CHARLES PUNIA, as Trustees for JEROME PUNIA, RICHARD GORDON, GRACE LIPSTEIN, PHILIP LIPSTEIN and HELEN GORDON, Limited Partners, doing business as PARK HILL APARTMENTS CO.,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LUCIAN J. ROSSI,
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375 Park Avenue,
New York 22, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1964

LUCIAN J. ROSSI,

Plaintiff-Petitioner,

against

WILLIAM MARX, CHARLES PUNIA, PHILIP LIPSTEIN, HELEN GORDON, General Partners, and HELEN S. MARX, LEONARD P. PUNIA, HERBERT PUNIA, CHARLES PUNIA, as Trustees for JEROME PUNIA, RICHARD GORDON, GRACE LIPSTEIN, PHILIP LIPSTEIN and HELEN GORDON, Limited Partners, doing business as PARK HILL APARTMENTS CO.,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HON. CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

LUCIAN J. ROSSI, the petitioner herein, applies for a writ of certiorari to review the final order of the Court of Appeals of the State of New York, which dismissed, without opinion, an appeal of the petitioner taken on constitutional grounds from the order of the Appellate Division, First Department, State of New York. Petitioner's earlier appeal to the Appellate Division, also affirmed, without opinion, the orders of Special Term, Supreme Court, New York County (Hofstadter, J.), which had earlier dismissed petitioner's civil court action on the grounds of failure to comply with the court's procedural orders, viz., to appear and be examined by the defendants before trial.

Statement of the Matter Involved

The question presented by this Appeal is: Can a lawsuit be dismissed, contrary to established state procedure and state law and without a hearing on the merits of the case at any point up to the final appeal dismissing it, without denying the party non-suited, his right to due process of law and to equal protection of the laws under the 5th and 14th Amendments?

The facts behind the petitioner's application herein, and indeed upon which he claims the need for intervention by this Court are fully set forth in the Record of Appeal, filed herein on December 9, 1964, at (pp. 47-54) *et seq.* and below in the Statement of Facts portion of this petition.

The bare facts upon which petitioner applies, on constitutional grounds for a writ of certiorari are the following:

1. Special Term of Supreme Court of New York State which issued the several orders appealed from to The Appellate Division, First Department culminating in the one dismissing plaintiff's civil action against defendants for $100,000 damages for trespass, invasion of privacy and deliberate breach of the lease between the parties, arbitrarily and capriciously granted these orders when:

(a) the defendants were themselves clearly in default in pleading;

(b) the defendants were themselves clearly in deliberate default in appearing to be examined at an examination before trial and having their agent and employee appear in response to subpoenas *duces tecum;*

(c) Special Term dismissed the complaint for failure of plaintiff to appear at an examination before trial when issue had not yet been joined on amended pleadings, contrary to established precedent and procedure in such cases made and provided by New York State Law; and

(d) Special Term dismissed the complaint when the plaintiff was clearly entitled to a judgment on default against the respondents.

2. All of the foregoing actions by Special Term constitute such a departure from established procedural law and practice in New York State as to constitute a denial to the plaintiff of due process of law and a denial to him of equal protection of the laws (See cases hereinafter cited in the Paragraph entitled "Jurisdiction").

3. That the Appellate Division, First Department in affirming the said orders of Special Term, despite the urging of petitioner in his brief of the leading case affirmed by the Court of Appeals to the contrary* and of recognized authorities on New York State Procedure (Carmody-Forkosch)** and the Civil Practice Rules and Law,*** *sanctioned this departure from established procedure and law as it is practiced in New York State* and denied petitioner his rights to due process and to equal protection of the laws under the New York State and U. S. Constitutions (5th and 14th Amendments).

4. That the said action of the Court of Appeals of New York in dismissing petitioner's appeal taken as of right on the said constitutional grounds of the denial to him of due process and equal protection of the laws upon respondents' motion, being rendered without opinion and without a hearing on the merits of petitioner's case on appeal, likewise denied petitioner due process of law and denied him a valuable property right, i.e., his cause of action against the respondents.

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* *Coleman* v. *Ted's Auto Sales, Inc.* (1962), 33 Misc. 2d 739, 34 Misc. 2d 100, 227 N.Y.S. 2d 693, affirmed 17 A. D. 2d 827 (Oct. 1962, 2nd Dept.), affirmed 12 N. Y. 2d 833 (N. Y. Ct. Appeals, Dec. 1962).

** *Carmody-Forkosch N. Y. Practice 8th Ed.* (1963), *Section 528.*

*** *Section 3102(a) C.P.L.R., Section 2103(b) 2 C.P.L.R.*

The Facts

*Plaintiff sued respondents for $100,000 damages in a Supreme Court action in New York State in civil suit for invasion of privacy, trespass and for deliberate breach of a lease between the parties.

Suit was commenced on September 23, 1963 by service of the original complaint on the defendants' managing agent. The defendants were sued as a corporation, "Park Hill Estates, Inc.", since they so represented themselves. In their answer they denied that they were a corporation. Plaintiff then investigated and with the help of the District Attorney's office of New York County which compelled defendants to file a partnership certificate under the "assumed names law" (Penal Law New York State—Section 440), the plaintiff amended his complaint to include a characterization of the respondents as a limited partnership doing business as "Park Hill Apartments Co." This

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* This case, perhaps, is the most unusual in the 20 years of practicing law that appellant has yet encountered. Appellant moved into a luxury apartment on Park Avenue and paid a luxury rent in 1963. He no sooner moved in but that he discovered that his apartment was being entered when he wasn't there; that his private correspondence, checkbooks and other personal and business papers were being examined in his absence; that the occupants of the apartment above his, were loud, vulgar and abusive and did continue such behavior into all hours of the night; that complaints about this condition were ignored by the landlord, the respondents herein; that calls to the police resulted in denial that such events were taking place; that appellant's sleep was being interfered with constantly; that both he and his guests were constantly embarrassed by the behavior of the people upstairs; that when he retained other counsel to advise him, he was advised to withhold the rent until the landlord took action to remedy the situation. That when he did so he was served with process on no less than five separate dispossess proceedings by landlord and that, despite numerous and embarrassing trips to Civil Court where the rent was paid without prejudice, the same conditions of noise, trespass and invasion of privacy continued to exist; that after two dismissals and two withdrawals of

(Footnote continued on following page)

amended complaint was served on defendants' counsel by mail on November 17, 1963 (p. 65).* Under New York State Law the answer was then clearly due 23 days later (allowing three additional days for service by mail) on December 10, 1963 (CPLR Section 3012(a), CPLR Section 2103(b) 2). However, the defendants did not serve their answer to the amended complaint until December 18, 1963. Defendants dispute this fact, but *their own affidavit of service* clearly sets forth that they served it one day late, viz., December 11, 1963 (p. 64).

Therefore the record shows that the defendants were in default in pleading on December 11, 1963 when the appellant's motion to enter judgment on default against the defendants and their motion to dismiss the complaint came on to be heard on December 30, 1963.

The defendants had earlier served a notice to examine plaintiff before trial but that notice was served and a new date set by Special Term before the answer to the amended

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(Footnote continued from preceding page)

such proceedings with the payment of rent, without prejudice, the landlord's attorneys forced appellant on in still another proceeding, and despite the fact that the court lacked jurisdiction for want of personal or other accepted methods of service, landlord's attorneys ignored motions then before the Appellate Division; and while said motions (for a stay and an appeal from the denial of a motion to consolidate the proceeding with this action) were still pending before that court, the respondents' attorneys proceeded to actually try and evict the appellant even though they were again offered the rent without prejudice and appellant was compelled to get the trial judge off the bench in Civil Court to order them to stop. These actions by landlord's attorneys and the marshal were duly reported to the Brooklyn Bar Association and the District Attorney's Office in New York County. Neither saw fit to take action. Finally, petitioner moved out in disgust in November 1963. Then followed the dismissal of petitioner's action by Special Term of Supreme Court, New York County, and petitioner's appeal from the dismissal of his complaint in the instant action to the Appellate Division. Then followed his appeal to the Court of Appeals on constitutional grounds. The time and sequence of the instant action, motions and appeals related thereto is set forth herein (*supra*).

* References are to pages of the record filed herewith.

complaint was served (i.e., before December 10, 1963). Clearly, no such examination of plaintiff could be held under New York State procedure and precedent because the defendants hadn't yet joined issue on the amended pleadings by serving an amended answer and such joinder of issue is required before the defendants can move to examine the plaintiff.

> *Coleman* v. *Ted's Auto Body*, 33 Misc. 2d 739, 34 Misc. 2d 100, 227 N.Y.S. 2d 693, 694 affirmed, 17 App. Div. 2d 827 (2nd Dept. 1962) affirmed, 12 N. Y. 2d 833 (N. Y. Ct. of Appeals Dec. 1962).

Therefore the defendants' notice to examine plaintiff before trial was a nullity and plaintiff's notice to examine the defendants was still valid under New York State procedural law because it was served following the joinder of issue on the original pleadings and as such, the leading New York case (*Coleman* v. *Ted's Auto Body, supra*) had affirmed the plaintiff and not defendants, was entitled to examine in that factual situation.

But is that merely a trivial point of procedure, one might ask? No, *because Special Term dismissed the complaint because of this alleged default of plaintiff in not appearing to be so examined.*

But more significantly than anything else that occurred, the defendants were also in default *in pleading and until relieved of such default, could not themselves apply for any relief* against the plaintiff. So states a leading textbook on New York Practice (Carmody-Forkosch N. Y. Practice 8th Ed. (1963) Section 528) (cited at pp. 12-13 of plaintiff's brief filed with Appellate Division, First Department).

So despite the defendants' defaults in pleading and their default in appearing at an examination before trial and incidentally in having their employees and agents respond to subpoenas duces tecum (pp. 60-61), *the plaintiff was*

*held in default, his complaint dismissed and his case thrown out of court with costs assessed against him.**

If that wasn't enough, the Appellate Division, First Department affirmed without opinion although all of the precedents, statute law and textbook authorities discussed above and in plaintiff's brief before that Court were cited to it.**

In view of the deliberate and capricious decision affirming without opinion the *findings of fact* (i.e., that defendants were not in default) and the orders of Special Term non-suiting the plaintiff, and in ignoring the law applicable to the case, plaintiff had no alternative but to appeal further to the New York State Court of Appeals on constitutional grounds, as of right.*** (Because of the sanction given such a departure from established precedent and procedure by the Appellate Division and consequently, by its denial of due process and equal protection of the laws to the plaintiff.)

But the Court of Appeals dismissed the appeal on respondents' motion, without opinion and without the hearing on the merits of plaintiff's contentions that he was thus deprived of his constitutional rights to due process and to equal protection of the laws (p. 16 of this petition).

That sequence brought plaintiff to the instant petition for a writ of certiorari from this Court.

Thus the gravamen of plaintiff's appeal lies in the following question of law: Can a lawsuit be dismissed, contrary to established state procedure and law and without a hearing on the merits of the case at any point in the judicial scale, without denying the party non-suited, his right to due process of law and to equal protection of the laws under the 5th and 14th Amendments?

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* See pages 69-70.

** Pages 12-13, Appellant's Brief before Appellate Division, 1st Dept.

*** See Notice of Appeal attached hereto at page 14 of this petition.

It is no mere error in law we are urging here. We state unequivocally that the affirmance by both New York State Appellate Courts in the face of contradictory facts, precedents to the contrary and contrary to procedural law, constituted an arbitrary and capricious denial to plaintiff of his *right to a hearing on the merits of his case* against the defendants and the denial to him of due process and equal protection required by the Constitution of the United States.*

Jurisdiction

1. Jurisdiction of this Court is invoked under Title 28 U. S. Code Section 1257, which provides in part:

> "Final judgment or decrees rendered by the highest court of a state, on which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . By Writ of Certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . ."

2. Rules of the Supreme Court of the United States:

Rule 19 governing Jurisdiction on Writ of Certiorari:

Par. 1. (b)—Where a Court of Appeals has . . . so far departed from the accepted and usual cause of

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*The instant appeal and one shortly to be heard, perhaps, makes necessary the allegation of one further fact that has bearing on the controversy between the parties and the strange manner in which the procedural requirements of State Law were ignored in this case. Plaintiff has known for some time past that the United States Treasury Department has been illegally investigating plaintiff's affairs and used various and illegal methods of search and eavesdropping and seizure. There has been some serious interference with plaintiff's business and practice. Plaintiff doesn't know to what extent that activity figured in the decisions already made in this case. However, the fact remains that that activity figured in this case in some measure. Only a full scale investigation by appropriate authority will reveal the extent and the responsibility of those agents directly involved. We mention this fact for the record for to ignore it would be to leave the record of these proceedings incomplete.

judicial proceedings, or *so far sanctioned such a departure by a lower court,* as to call for an exercise of the court's power of supervision."

3. The following cases are believed to sustain the jurisdiction of this Court:

Pennoyer v. *Neff,* 95 U. S. 714;
Scott v. *McNeal,* 154 U. S. 34;
Rooker v. *Fidelity Trust Co.,* 263 U. S. 413;
Postal Telegraph Cable Co. v. *Newport,* 247 U. S. 464 page 475;
Windsor v. *McVeigh,* 93 U. S. 274, 277;
Louisville & N. R. Co. v. *Schmidt,* 177 U. S. 230, 236;
American Surety Co. v. *Baldwin,* 287 U. S. 156;
See also 13 ALR 2d 477, 566;
86 ALR 298.

4. At page 477, of 13 ALR 2d is summarized the general theme of these cases:

"It is possible to allege a substantial Federal question under the due process of law requirement of the Federal Constitution on the ground that a state court violated the guaranty . . .

. . . to do so one must show substantial deprivation of due process in the procedural sense by denying notice and hearing, etc., or if possible, in some substantive sense by arbitrary state action."

Here petitioner claims not only a denial of hearing on the merits of his case but an arbitrary and capricious dismissal of his action by Special Term and a sanction of such arbitrary action by the higher Appellate Courts of New York State despite substantial facts, law and precedent to the contrary.

5. The Court of Appeals of the State of New York is the highest Court of the State.

6. The order of which review is sought is a final order of the Court of Appeals of the State of New York.

7. The order herein sought to be reviewed was filed on October 1, 1964.

8. The Federal questions of substance which have been decided by the State Court are:

(1) Can a cause of action be dismissed not because of mere error in the application of procedural law, both precedent and text, but because of a deliberate and arbitrary refusal by an appellate court to review such a dismissal in the face of existing authority?

(2) Can a State Appellate Court sanction such a departure from established state procedural practice as to deny a plaintiff his right to a hearing on the merits of his case for substantial damages against parties defendant?

(3) Can a State Appellate Court sanction such a departure and dismissal of a cause of action without opinion and without a hearing on the merits of the case and to do all of this despite the plaintiff's rights under existing State law and under the Federal and State Constitutions, to due process of law and to equal protection of the laws?

9. The Federal question was timely raised and considered. That point was raised on petitioner's appeal filed with the Court of Appeals. (See pp. 1-2 *et seq.* of petitioner's affidavit in opposition to the defendants' motion to dismiss the appeal filed with the Court of Appeals, annexed hereto with the Record.)

Reasons Relied on for Allowance of the Writ

1. The Appellate Courts of the State of New York have refused to review a case containing several relevant and important questions of constitutional law as it affects the procedural requirements of due process and equal protection of the laws.

2. An important question of law has been presented by this petition: Can a lawsuit arbitrarily be dismissed contrary to established procedure and precedent, without denying a plaintiff due process of law and equal protection of the laws under the 5th and 14th Amendments of the United States Constitution? We submit in the light of the cases cited above in paragraph on "Jurisdiction", the answer to that question must be in the negative.

Lucian J. Rossi,
Attorney at Law,
Petitioner *in Personam*,
375 Park Avenue,
New York, New York.

APPENDIX

Order of Affirmance by Appellate Division Appealed From.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 26th day of May, 1964.

Present: Hon. Bernard Botein,
Presiding Justice,
" Benjamin J. Rabin,
" Francis L. Valente,
" James B. M. McNally,
" Samuel W. Eager,
Justices.

Lucian J. Rossi,
Plaintiff-Appellant,

against

William Marx, Charles Punia, Philip Lipstein, Helen Gordon, General Partners, and Helen S. Marx, Leonard P. Punia Herbert Punia, Charles Punia, As Trustees for Jerome Punia, Richard Gordon, Grace Lipstein, Philip Lipstein and Helen Gordon, Limited Partners, doing business as Park Hill Apartments Co.,

Defendants-Respondents.

7452/7453/7454/7455.

An appeal having been taken to this Court by the plaintiff-appellant from four orders of the Supreme Court, New York County, (1) entered on January 8, 1964, denying plaintiff's cross-motion to enter judgment on default

against the defendants, under Section 3215(b), CPLR; (2) entered on January 8, 1964, as directs plaintiff to appear for examination before trial and to pay the sum of $20 for stenographic services; (3) entered on January 21, 1964 denying plaintiff's cross-motion to enter judgment on default against the defendants, under Section 3215(b), CPLR, and modifying the previous order of January 8, 1964; and (4) entered on February 3, 1964, granting defendants' motion to dismiss the complaint,

And said appeal having been argued by Mr. Lucian J. Rossi appellant *pro se*, and by Mr. Seymour C. Simon of counsel for respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the orders so appealed from be and the same are hereby affirmed with $20 costs and disbursements to respondents.

Enter:

VINCENT A. MASSI,
Clerk.

Appendix

Notice of Appeal to Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK,
NEW YORK COUNTY.

LUCIAN J. ROSSI,
Plaintiff-Appellant,

against

WILLIAM MARX, CHARLES PUNIA, PHILIP LIPSTEIN, HELEN GORDON, General Partners, and HELEN S. MARX, LEONARD P. PUNIA, HERBERT PUNIA, CHARLES PUNIA, As Trustees for Jerome Punia, RICHARD GORDON, GRACE LIPSTEIN, PHILIP LIPSTEIN and HELEN GORDON, Limited Partners, doing business as Park Hill Apartments Co.,
Defendants-Respondents.

Index No. 15254—1963.

SIRS:

PLEASE TAKE NOTICE, that the above named Plaintiff hereby appeals to the Court of Appeals from the order entered by the Appellate Division, First Department in the Office of the Clerk of the County of New York, on or about the 26th day of May, 1964, unanimously affirming the orders of the Special Term of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on January 8, 1964, January 21, 1964 and February 3rd, 1964 (all by Mr. Justice Hofstadter), and the plaintiff appeals from each and every part of said order, affirming the dismissal of plaintiff's complaint, and

from the whole thereof. This appeal is taken as of right on the ground that a constitutional question is involved.

Dated: June 12, 1964, New York, N. Y.

Yours, etc.,

LUCIAN J. ROSSI,
Attorney for Plaintiff-Appellant,
Office & P. O. Address,
55 East 87th Street,
New York, N. Y.

To:

DREYER & TRAUB,
Attorneys for Respondents,
Office & P. O. Address,
16 Court Street.

Appendix

Order of Court of Appeals Granting Motion to Dismiss Appeal.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the first day of October A. D. 1964.

Present, Hon. CHARLES S. DESMOND, Chief Judge, presiding.

No. 739

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1 Mo. No. 739

LUCIAN J. ROSSI,

Appellant,

v.

WILLIAM MARX & ors., General Partners, and HELEN S. MARX & ors., Limited Partners, d/b/a PARK HILL AP[illegible]RTMENTS Co.,

Respondents.

A motion having heretofore been made upon the part of the respondents to dismiss the appeal and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is directly involved.

GEARON KIMBALL,
Deputy Clerk.

[SEAL]

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 795

LUCIAN J. ROSSI,

Plaintiff-Petitioner,

—against—

WILLIAM MARX, CHARLES PUNIA, PHILIP LIPSTEIN, HELEN GORDON, General Partners, and HELEN S. MARX, LEONARD P. PUNIA, HERBERT PUNIA, CHARLES PUNIA, as Trustees for JEROME PUNIA, CHARLES GORDON, GRACE LIPSTEIN, PHILIP LIPSTEIN and HELEN GORDON, Limited Partners, doing business as PARK HILL APARTMENTS CO.,

Defendants-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

DREYER and TRAUB,
By SYLVAN D. FREEMAN,
Attorneys for Respondents,
16 Court Street,
Brooklyn 1, New York.

32 CASE PRESS INC., 421 Hudson St., N.Y.—OREgon 5-4540

Supreme Court of the United States

October Term, 1964

No. 795

LUCIAN J. ROSSI,

Plaintiff-Petitioner,

—against—

WILLIAM MARX, CHARLES PUNIA, PHILIP LIPSTEIN, HELEN GORDON, General Partners, and HELEN S. MARX, LEONARD P. PUNIA, HERBERT PUNIA, CHARLES PUNIA, as Trustees for JEROME PUNIA, CHARLES GORDON, GRACE LIPSTEIN, PHILIP LIPSTEIN and HELEN GORDON, Limited Partners, doing business as PARK HILL APARTMENTS CO.,

Defendants-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

Statement

Petitioner appealed to the Appellate Division, First Judicial Department of the Supreme Court of the State of New York (hereinafter Appellate Division) from four orders of the Supreme Court, New York County (hereinafter Special Term), two of which denied petitioner's motions to enter judgment on default against the defendants, one of which directed petitioner to appear for examination before trial, and the fourth of which granted respondents' motion to dismiss the complaint. The first three orders are

clearly intermediate non-final orders. Only the fourth order dismissing the complaint may be deemed a final order.

The Appellate Division unanimously affirmed all four orders. The petitioner then appealed to the Court of Appeals of the State of New York and while his appeal appears directed to the entire order of the Appellate Division, it is clear that it was directed only against so much of the order of the Appellate Division as affirmed the order of Special Term dismissing the petitioner's complaint.

Since the affirmance of the Appellate Division was unanimous, petitioner would have a right to appeal to the Court of Appeals from the order of the Appellate Division only if it finally determined the action and there was "directly involved the construction of the constitution of the state or of the United States" (Section 5601 of the New York Civil Practice Law and Rules).

Respondents' motion in the Court of Appeals to dismiss the appeal was granted "upon the ground that no substantial constitutional question is directly involved."

Facts Material to the Question Presented

The New York Civil Practice Law and Rules (hereinafter CPLR) became effective September 1, 1963. An action in New York is commenced by the service of a summons (Section 304, CPLR).

On September 23, 1963, the petitioner commenced this action by serving a summons without a complaint.

On September 26, 1963, the respondent, Park Hill Apartments Co., served a notice of appearance.

On October 11, 1963, respondents' attorneys received petitioner's unverified complaint.

On October 23, 1963, respondent, Park Hill Apartment Co., joined issue by serving its answer and at the same time demanded a bill of particulars.

On October 30, 1963, respondents served a notice of examination before trial on petitioner personally, scheduling the examination for December 7, 1963.

On October 31, 1963, respondents' attorneys received by mail a notice of motion from petitioner to vacate the notice to examine him before trial and to compel respondents to amend their answer. This motion was denied by Special Term on November 22, 1963, at which time the Court directed the petitioner to appear for examination before trial on December 12, 1963, at 11:00 A.M. Petitioner was served with a copy of the Court's order by mail on December 2, 1963.

On December 12, 1963, petitioner failed to appear for examination before trial.

On December 13, 1963, respondents moved by motion returnable December 26, 1963, to dismiss petitioner's complaint because of his failure to submit himself to examination before trial. On January 8, 1964, Special Term denied respondents' motion to dismiss upon the ground that it did not appear that petitioner's failure to attend the examination before trial was deliberate or willful. However, the Court ordered the petitioner to pay respondents the sum of $20.00 for stenographic services incurred as a result of petitioner's default and directed petitioner "to appear for examination before trial at a time and place to be designated

by the defendants." A copy of this order together with a new notice pursuant to the order directing petitioner to appear for examination before trial at the Courthouse on January 20, 1964, at 10:00 A.M. were served on petitioner by mail on January 10, 1964.

Again, petitioner defaulted, and again respondents moved for an order dismissing the complaint because of petitioner's failure to appear for examination before trial. On January 30, 1964, Special Term granted respondents' motion to dismiss the complaint unless within 10 days after service of the order, with notice of entry, petitioner (a) paid the sum of $20.00 for stenographic services directed to be paid by the order of January 8, 1964, (b) paid an additional sum of $20.00 for stenographic services incurred by respondents on January 20, 1964, and (c) appeared for examination before trial at the Court on February 17, 1964.

Petitioner could have cured his defaults and avoided dismissal of his complaint by paying respondents the sum of $40.00 and by submitting himself to examination before trial. This he failed to do and accordingly, his complaint was dismissed.

ARGUMENT

The petition for certiorari should be denied in all respects because no substantial constitutional question is directly involved and because the determination of the New York courts rested on an adequate non-Federal ground.

Petitioner's complaint was dismissed because of his intentional refusal to appear on three different occasions to be examined before trial pursuant to order of the Supreme Court, New York County. If we understand petitioner's contention correctly, he argues that he was not required to appear for examination before trial until issue had been joined-and that the respondents had not joined issue on the amended complaint at the time that they served their notice to examine him before trial.

Petitioner claims that *Coleman* v. *Ted's Auto Sales Inc.*, 33 Misc. 2d 739, 34 Misc. 2d 100, affirmed 17 App. Div. 2d 827, motion for leave to appeal, dismissed 12 N.Y. 2d 833, supports his contention. In so far as the present issues are concerned, *Coleman* is merely a lower Court decision decided before the CPLR became effective. Three motions were involved in *Coleman,* the first relating to an order vacating the examination before trial, the second involving an order modifying a demand for a bill of particulars, and the third motion involving the sufficiency of pleadings. Only the decision of the lower Court relating to the motion to dismiss the pleadings for insufficiency was appealed to and affirmed by the Appellate Division. The Court of Appeals never affirmed the lower Courts but merely denied leave to appeal to that Court. Neither the Appellate Division nor the Court of Appeals ever passed upon the question of

priority of examination before trial despite petitioner's assertion to the contrary.

Even if the decision at Special Term in *Coleman* was good law in 1962, it is no longer applicable today. Since September 1, 1963 in New York, the right to examination before trial is no longer dependent upon joinder of issue. R. 3106 of the CPLR is similar to Rule 26(a) of the Federal Rules of Civil Procedure and provides that a defendant may take a deposition without leave of Court as soon as the action is commenced. Here the action was commenced on September 23, 1963 and respondents served their notice of examination before trial on October 30, 1963, returnable December 7, 1963. Respondents' notice to examine the petitioner before trial was proper and timely under the CPLR. (Cf. *Revesz* v. *Geiger*, 40 Misc. 2d 818; *Skrill* v. *Skrill*, 42 Misc. 2d 22; *Pakter* v. *Eli Lilly & Company*, 19 App. Div. 2d 810).

Section 3126 of the CPLR, which is based on Federal Rule 37(b) (3 Weinstein-Korn-Miller, New York Civil Practice, p. 31-230), provides that if a party fails to appear for examination before trial (id. p. 31-238) "the court may make such orders with regard to the failure or refusal as are just, among them:

* * * * *

> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

Section 3126 of the CPLR is constitutional. (*Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322; *Feingold* v. *Wal-*

worth Bros. Inc., 238 N.Y. 446; *Nasser* v. *Isthmian Lines*, 331 F. 2d 124, 2nd Cir. 1964).

Petitioner's refusal to appear for examination before trial on three different occasions, although ordered by the Court to do so, mandated the dismissal of the complaint. (*Macedo Soares, Inc.* v. *Guertzenstein*, 279 App. Div. 744.)

Respectfully submitted,

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